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No. 87-519

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance "especially heinous, atrocious, or cruel" in an unconstitutional manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim in reviewing death sentences in which that aggravating circumstance has been found.

2. Whether the finding by the jury of a second aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person, in addition to the finding that the murder was "especially heinous, atrocious, or cruel," sufficiently

narrowed the class of persons subject to the death sentence.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The decision of the United States Court of Appeals from which certiorari has been granted is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc) (J.A. 35). This decision vacated the opinion of the original three judge panel, which

had affirmed the denial of Cartwright's (hereinafter referred to as "the Defendant") petition for a writ of habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The en banc opinion reversed the order and judgment of the United States District Court for the Eastern District of Oklahoma, Cartwright v. Maynard, No. 86-54-C (E.D. Okla. Feb. 11, 1986).

The opinion of the case on direct appeal is reported as Cartwright v. State, 695 P.2d 548 (Okla. Crim. App. 1985), cert. denied, 473 U.S. 911 (1985) (J.A. 20).

The opinion of the Oklahoma Court of Criminal Appeals in the post-conviction appeal of this case is reported as Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985), cert.

denied, 474 U.S. 1073 (1986), which affirmed the findings of fact and conclusions of law of the District Court of Muskogee County in State v. Cartwright, No. PC-84-665 (Okla. Crim. App. 1985).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

Okla. Stat. tit. 21, § 701.7 (1981)[1]

stated:

> A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla. Stat. tit. 21, § 701.9 (1981)

states:

> A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by

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[1] This section was amended in 1982 adding a paragraph that related to the death of a child.

> death or by imprisonment for life.
>
> B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Okla. Stat. tit. 21, § 701.10 (1981) states:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, of if the defendant pleaded guilty or nolo contendére, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation

> as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. tit. 21, § 701.11 (1981) states:

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the

> finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21, § 701.12 (1981)

states:

> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
>
> 2. The defendant knowingly created a great risk of death to more than one person;
>
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;
>
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> 6. The murder was committed by a person while serving a sentence

of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty.

Okla. Stat. tit. 21, § 701.13 (1981) (since amended) stated:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and

address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to

present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE CASE

William Thomas Cartwright (hereinafter referred to as "the Defendant"), was convicted in the District Court of Muskogee County for

the crimes of murder in the first degree and shooting with intent to kill after a trial by jury, and was given the death sentence by the same jury for the murder conviction. The trial and sentencing took place on October 18-21, 1982.

At trial, evidence was presented showing that on the evening of May 4, 1982, Charma Riddle and her husband Hugh, returned to their residence after spending the previous night at the home of her parents (Tr. 383, 385-86). The Riddles were co-owners of a remodeling business (Tr. 383).

After eating dinner, Mr. and Mrs. Riddle were sitting in the living room watching television. Mrs. Riddle got up to use the bathroom. As she started down the hallway leading to the

bathroom, she was suddenly confronted by the Defendant, a former employee, who apparently had surreptitiously entered the Riddle's house. The Defendant leveled a shotgun at Mrs. Riddle's stomach (Tr. 391). When Mrs. Riddle grabbed the barrel of the shotgun in self-defense, the Defendant shot her in the leg. When she fell to the floor, the Defendant shot her in the other leg, and then proceeded to the living room. There he shot and killed Hugh Riddle with one blast from the shotgun (Tr. 391-92).

Mrs. Riddle was able to crawl to the bedroom, and there she attempted to use the telephone to call for help. After the Defendant shot Mr. Riddle, he came into the bedroom where Mrs. Riddle was, and advised her that he had

murdered Mr. Riddle because they had fired him. The Defendant then slit Mrs. Riddle's throat, and stabbed her in the abdomen (Tr. 394).

Mrs. Riddle lost a leg because of the attack, but incredibly, she survived,[2] and identified the Defendant at trial (Tr. 396-97).

Other evidence at trial revealed that the Defendant told friends and co-workers that he was upset with the Riddles because they had not wanted to pay the doctor bills for injuries sustained by the Defendant while he was employed by them. The Defendant also stated that he was going to "get even"

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[2] The doctor who examined Mrs. Riddle when she arrived at the emergency room testified that she had lost so much blood because of the attack that she had no blood pressure and "was literally at death's door." (Tr. 303).

if he did not get any money (Tr. 101-02; 124-25).

The Defendant admitted going to the Riddles' house and having a conversation with Mr. Riddle, but claimed that he was hit on the head as he turned and walked away from him (Tr. 478-88).

The Defendant also produced a number of witnesses who testified that he was a good employee, was not a violent person, and did not get upset (Tr. 444, 446-47, 451-52, 454-55, 459-63, 467).

The jury returned a verdict of guilty for the crime of murder in the first degree in Count I of the information, and shooting with intent to kill in Count II (Tr. 606). The jury sentenced the Defendant to

seventy-five years in prison for the shooting with intent to kill conviction (Tr. 606).

In the second stage of the trial, both sides relied on virtually the same evidence as was introduced in the first stage (Tr. 611-17). The jury returned a sentence of death, finding the existence of two aggravating circumstances: (1) that the Defendant knowingly created a great risk of death to more than one person; and (2) that the murder was especially heinous, atrocious, or cruel (Tr. 637); (J.A. 18).

On direct appeal to the Court of Criminal Appeals, the court upheld the finding of both aggravating circumstances. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App. 1985);

(J.A. 20). The court held that the aggravating circumstance "especially heinous, atrocious, or cruel" was supported by the evidence for the following reasons:

> Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to

> kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only the arrival of the police officers, adequately supported by the jury's finding. See as well our discussion in Nuckols v. State, 690 P.2d 463, 55 O.B.A.J. 2259 (Okl. Cr. 1984), of the consideration to be given to the manner of a killing in determining whether the murder is heinous, atrocious or cruel.

Id. at 554; (J.A. 30).

The court also held that the evidence was sufficient to support the other aggravating circumstance, that the Defendant's acts created a great risk of death to more than one person. Cartwright v. State, 695 P.2d at 555; (J.A. 31).

The court also conducted a

proportionality review in accordance with Okla. Stat. tit. 21 § 701.13 (1981) (since amended).

After the Defendant pursued his remedies through the state court system, he filed a petition for a writ of habeas corpus which was denied by the United States District Court for the Eastern District of Oklahoma.

The Defendant then appealed the denial of his petition for writ of habeas corpus to the United States Court of Appeals for the Tenth Circuit. The original three judge panel affirmed the denial of the Defendant's Petition for Writ of Habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). However, the Circuit granted a rehearing en banc, and subsequently the entire panel issued an opinion in which

it reversed the denial of the Defendant's petition as to the sentencing stage of the Defendant's trial. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); (J.A. 35).

The en banc panel held that the Oklahoma Court of Criminal Appeals had failed to apply a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." The court stated that the state appellate court's construction of this aggravating circumstance did not genuinely narrow the class of murders to which the death penalty was to be applied, in violation of Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420 (1980). 822 F.2d at 1491.

The court also held that since capital sentencing juries in Oklahoma weighed aggravating and mitigating circumstances, and since the Court of Criminal Appeals did not conduct an independent reweighing on appeal when an invalid aggravating circumstance had been found, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was not applicable. The court in Cartwright stated that the overbroad construction of the aggravating circumstance "especially heinous, atrocious, or cruel" required that the death sentence be invalidated, despite the fact that the jury found the existence of another aggravating circumstance, that the Defendant knowingly created a great risk of death to more than one person. Cartwright v. Maynard, 822

F.2d at 1481-83. The court held that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." Id. at 1483.[3]

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[3] In response to the present case, the Oklahoma Court of Criminal Appeals, in Stouffer v. State, 742 P.2d 562 (Okla. Crim. App. 1987) (on rehearing), made two revisions in its review of capital cases. The aggravating circumstance "especially heinous, atrocious, or cruel" is now limited to instances where the death of the victim was preceded by torture or serious physical abuse, and the Court of Criminal Appeals now will reweigh aggravating and mitigating circumstances if an aggravating circumstance is not supported by the evidence. Id. at 563-65. However, a number of pending Oklahoma capital cases are threatened by the Tenth Circuit's ruling. See, e.g., Coleman v. Brown, 802 F.2d 1227, 1235 (10th Cir. 1986); Stafford v. State, 665 P.2d 1205, 1217 (Okla. Crim. App. 1983), vacated 467 U.S. 1212 (1984), aff'd., 700 P.2d 223 (Okla. Crim. App. 1985). The Coleman

(continued...)

SUMMARY OF ARGUMENT

I.

The United States Court of Appeals for the Tenth Circuit invalidated the death sentence in this case because it believed that the Oklahoma Court of Criminal Appeals was not applying a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." Oklahoma contends that it is appropriate for a state appellate court to consider the manner of killing, the attitude of the killer, and the suffering of the victim when construing this aggravating circumstance. In the

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[3](...continued)
case was argued in the Tenth Circuit in its second federal habeas corpus appeal on October 2, 1987, primarily regarding the issue of the effect of the present case on it. See Coleman v. Saffle, No. 87-2011.

present case the evidence demonstrated that the Defendant surreptitiously entered the home of Hugh and Charma Riddle, shot Mrs. Riddle in the leg, left her to murder her husband with a shotgun, then returned to cut her throat and stab her in the abdomen. Oklahoma contends that this evidence sufficiently supports the state court's finding that the murder was "especially heinous, atrocious, or cruel."

This Court should not require that the aggravating circumstance "especially heinous, atrocious, or cruel" be limited to situations involving serious physical abuse. The wording of the phrase itself, which was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 255 (1976), makes it appropriate for the sentencer

to consider the manner of the killing, and the attitude of the killer, as well as the suffering inflicted upon the victim. Other state appellate courts have held that it is appropriate to consider those factors in reviewing the sufficiency of the evidence supporting such. Because the states are not restricted as to what aggravating circumstances they can select, and since aggravating circumstances throughout the country vary with regard to all aspects of a murder case, Oklahoma could appropriately consider the facts that it did when reviewing the Defendant's death sentence.

Furthermore, the requirement that a victim suffer physical pain before this aggravating circumstance could be found would mean that an artificial and

arbitrary line has been drawn between different types of murders. For example, someone who is killed with a knife is likely to suffer more physical pain than a victim of a gunshot wound. Additionally, since some states have held that the aggravating circumstance in question can be met if the victim underwent psychological torture, the only difference between that interpretation and Oklahoma's (and other states that construe "especially heinous atrocious, or cruel" similarly), is whether the victim was aware that he or she was about to be murdered. States should be free to have the aggravating circumstance "especially heinous, atrocious, or cruel" include consideration of the

attitude of the killer, and the manner in which the killing was performed.

It is Oklahoma's view that it is an impossible task for a state appellate court to make distinctions between different kind of murders, and that as long as the aggravating circumstance in question has generally narrowed the class of persons to which the death penalty is subject, and if the evidence is sufficient to support that aggravating circumstance, the inquiry by the federal court should end.

II.

It should not be unconstitutional for a state to have a aggravating circumstance that allows the sentencer to use subjective considerations. In Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983); California v. Ramos, 463

U.S. 992, 1001-06 (1983); and Jurek v. Texas, 428 U.S. 262, 274-76 (1976), this Court held that future conduct is a proper consideration in the decision whether to impose the death penalty. Since that aggravating circumstance is more vague than the "especially heinous, atrocious, or cruel" aggravating circumstance, and requires the sentencer to speculate as to the future conduct of the murderer, the United States Court of Appeals for the Tenth Circuit in this case, and the Ninth Circuit in the case of Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), were wrong when they held that the aggravating circumstance "especially heinous atrocious, or cruel" cannot have a subjective aspect.

The aggravating circumstance in question should not be used as a vehicle to give federal courts supervisory review over state courts to determine whether they are appropriately evaluating the death penalties imposed in their jurisdictions. The holding by this Court in Pulley v. Harris, 465 U.S. 37 (1984), which held that states are not required to conduct a proportionality review of death sentences, supports Oklahoma's position.

Further evidence of the unworkability of the requirement that state appellate courts attempt to insure that different juries in different cases are imposing death sentences in a principled manner is the fact that

prosecutors have total discretion as to what charges are to be filed.

Also, because this Court has previously held that nonstatutory aggravating circumstances can be considered by the sentencer, requiring that all statutory aggravating circumstances be objective has no purpose.

Finally, it is futile to require states to interpret "especially heinous, atrocious, or cruel" in a objective manner because this Court has repeatedly held that a sentencer must consider any relevant mitigating evidence relating to a defendant's character or background. This decision is completely subjective because the jury has complete and unguided discretion with regard as to what they

consider mitigating, and whether the mitigating factors outweigh the aggravating circumstances.

III.

Because the jury in the present case also found the existence of a second aggravating circumstance, that the acts of the Defendant "knowingly created a great risk of death to more than one person," Oklahoma has genuinely narrowed the class of persons subject to the death penalty. Therefore, this case is identical, both factually and legally, to Lowenfield v. Phelps, 108 S.Ct. 546 (1988), where the death penalty was upheld in a case where the jury found only one aggravating circumstance, which also was that the defendant "knowingly

created a great risk of death or bodily harm to more than one person."

The Tenth Circuit also invalidated the death sentence in the present case because under Oklahoma's capital punishment scheme, the jury balances aggravating versus mitigating circumstances, and since the Tenth Circuit found that the aggravating circumstance "especially heinous, atrocious, or cruel" was "invalid," the death penalty would have to be set aside. Oklahoma's capital sentencing statute, however, is essentially the same as Louisiana's, in that both require the jury to either "weigh" aggravating against mitigating circumstances, or to "consider" mitigating circumstances. The difference between whether the jury "weighed" or "considered" aggravating

and mitigating circumstances is a matter of semantics.

Furthermore, the Oklahoma Court of Criminal Appeals never held that the aggravating circumstance "especially heinous, atrocious, or cruel" was invalid, or that the evidence was insufficient to support such. Finally, all evidence that was admissible to prove "especially heinous, atrocious, or cruel" was admissible to support the aggravating circumstance "knowingly creat[ing] a great risk of death to more than one person."

ARGUMENT

PROPOSITION I.

SINCE THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING BY THE JURY AND THE OKLAHOMA COURT OF CRIMINAL APPEALS THAT THE SHOTGUN MURDER OF THE VICTIM WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," THE DEATH SENTENCE SHOULD NOT BE SET ASIDE ON THE PURPORTED GROUND THAT THE SENTENCER'S DISCRETION WAS NOT ADEQUATELY CHANNELED BY THIS SENTENCING GUIDELINE.

This case involves the application of the aggravating circumstance "especially heinous, atrocious, or cruel," review of which will necessarily implicate similar aggravating circumstances, such as those which require that the murder be "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of

mind. . . ." See, e.g., Ga. Stat. Ann. § 17-10-30 (1982).[4]

Although this aggravating circumstance has been criticized as being vague, see Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941 (1986) [hereinafter Especially Heinous], it was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). This holding by the Court has been relied upon by the states for eleven

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4 Throughout this brief these similar aggravating circumstances will be referred to as "especially heinous, atrocious, or cruel" or its equivalent. Twenty-four states have "especially heinous, atrocious, or cruel" or its equivalent as an aggravating circumstance. See Appendix "A;" Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941, 943 (1986).

years. In Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 474 U.S. 975 (1986), the Eleventh Circuit noted:

> [The petitioner's] charge that the phrase "especially heinous, atrocious or cruel" is unconstitutionally vague has been decisively repudiated by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976).

See also Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982) (court notes that in Gregg v. Georgia, 428 U.S. 153 (1976), the Georgia aggravating circumstance was not held to be unconstitutional on its face).

The jury in the present case was given the following definition of "especially heinous, atrocious, or cruel" (Instruction No. 16):

> As used in these Instructions, the term "heinous" means

> extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

(J.A. 12). The instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), a case referred to in Proffitt v. Florida, 428 U.S. 242, 255 (1976).

The Tenth Circuit observed that the Oklahoma Court of Criminal Appeals, in reviewing cases in which that aggravating circumstance had been found, has held that either the attitude of the killer, the mannér of the killing, or the suffering of the victim can be used to uphold a jury finding that this aggravating circumstance existed. The Tenth Circuit held, therefore, that the Oklahoma court had not interpreted this

aggravating circumstance in a way that genuinely narrowed the class of persons subject to the death sentence. Cartwright v. Maynard, 822 F.2d at 1488-91.

A. THE DEFINITION OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" SHOULD NOT BE LIMITED TO THOSE SITUATIONS WHERE THE VICTIM HAS SUFFERED PHYSICAL OR MENTAL TORTURE; THE WORDING OF THE PHRASE ITSELF MAKES IT APPROPRIATE FOR THE SENTENCER TO CONSIDER THE MANNER OF THE KILLING AND THE ATTITUDE OF THE KILLER.

The opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance "especially heinous, atrocious, or cruel" must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered in determining whether the

murder in question fits the definition. See Cartwright, 822 F.2d at 1488-90. The court also criticized the Oklahoma court for allowing reliance on all of the circumstances of the crime in determining whether the murder was "especially heinous, atrocious, or cruel." Id. at 1490 ("inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense"), and at 1491 ("Consideration of all of the circumstances is permissible; reliance upon all of the circumstances is not.").

If there is a constitutional distinction between "consideration" and "reliance" in this context, it is one that is not understood by the State.

While it has been suggested that the Court in Godfrey v. Georgia, 446 U.S. 420 (1980) made evidence of serious physical abuse a constitutional element of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, deprivation of mind. . . ." (and necessarily, its equivalent, "especially heinous, atrocious, or cruel"), see Godfrey, 442 U.S. at 443 (Burger, C.J., dissenting), Oklahoma contends that "especially heinous, atrocious, or cruel" or its equivalent has not been given such a restrictive definition by the courts interpreting such, and should not be so limited by this Court.

In Turner v. Bass, 753 F.2d 342, 352 (4th Cir. 1985), rev'd on other grounds sub. nom. Turner v. Murray, 474

U.S. 28 (1986), the Fourth Circuit upheld the death sentence in a case where the defendant (who was convicted of shooting a store owner with a handgun), and rejected his challenge to the aggravating circumstance in question, that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. While noting that the Supreme Court of Virginia, applying Godfrey v. Georgia, 446 U.S. 420 (1980), had adopted a requirement that the murder involve either torture or "aggravated battery," the Fourth Circuit stated that the murder in Turner "was cold-blooded and calculated, involving no emotional trauma as was present in Godfrey." In

other words, the court reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was similar to the review conducted by the Oklahoma Court of Criminal Appeals in the present case.

The State in the present case also points out that the requirement of an "aggravated battery" mentioned in Turner does not necessarily make the aggravating circumstance less vague. Any murder committed with a knife or a firearm arguably involves "aggravated battery" to the victim. Certainly it could be argued that the victim in the present case, Hugh Riddle, was a victim of an "aggravated battery" since he was shot with a shotgun.

Nor is there any meaningful difference between the death of Hugh Riddle and the victim in Turner v. Bass, 753 F.2d at 344, 352-53. The defendant in Turner shot the victim in the head with a handgun, and then shot him again twice as he lay "still living, helpless and 'gurgling.'" Presumably he was unconscious, since the opinion states that only a witness pleaded with the petitioner not to shoot anyone else, and the opinion of the Supreme Court of Virginia in that case notes that the store owner was shot in the temple. Turner v. Commonwealth, 273 S.E.2d 36, 39 (Va. 1980). Since the victim was rendered unconscious by the first gunshot, it is obvious that he was not a victim of torture.

In Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987), the Ninth Circuit observed that the Arizona Supreme Court adopted the dictionary definitions of the aggravating circumstance "especially heinous, cruel, or depraved manner," and that the terms that defined such "go to the mental state and attitude of the perpetrator as reflected in his words and actions." Id. at 483. The Arizona Supreme Court had in previous cases set forth five factors that lead to a finding of heinousness or depravity: (1) a relishing of the murder by the killer; (2) gratuitous violence against the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim. The Ninth Circuit held that

since the standard of heinousness and depravity could not be applied in a principled manner to the defendant in that case, the death sentence must be stricken as being arbitrary. Id. at 485.

Another panel of the Ninth Circuit, however, has upheld the Arizona Supreme Court's application of the same aggravating circumstance. Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987).

In Especially Heinous 64 N.C.L. Rev. at 972-88, the author sets forth cases in the states of Florida, North Carolina, Tennessee, Nebraska, Alabama, Arizona, Georgia, Mississippi, Missouri, Oklahoma and Virginia, where state appellate courts have interpreted "especially heinous, atrocious and

cruel" or its equivalent to encompass factors such as the murder's attitude, and the manner of killing. A number of those cases involve situations where the victim has died instantly, and without apparent physical or mental suffering.

Other cases have upheld the aggravating circumstance "especially heinous, atrocious, or cruel" or its equivalent when the victim suffered psychological torture. See Lindsey v. Smith, 820 F.2d 1137, 1153 (11th Cir. 1987) (victim who was bound and gagged suffered psychological torture before her murder); and Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987) (victims were executed by being shot one by one in the head in the presence of the

others). See also White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987) (the aggravating circumstance "especially heinous, atrocious, or cruel" was properly applied to a participant in the Francois murders who was opposed to the executions).

Significantly, the amended bill of particulars in the present case, in specifying what was meant by "especially heinous, atrocious, or cruel," states that the shotgun slaying inflicted great pain and suffering on the victim, Hugh Riddle (J.A. 6). Also, the Oklahoma Court of Criminal Appeals found that "Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror

as he was confronted by the appellant and realized his impending doom." Cartwright, 695 P.2d at 554.

In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987), cert. denied, 108 S.Ct. 6 (1987), the Fifth Circuit upheld the finding by the federal district court that the aggravating circumstance "especially heinous, atrocious, or cruel" was properly submitted to the jury without a limiting instruction and without sufficient evidence. See also Evans v. Thigpen, 631 F. Supp. 274, 284-85 (S.D. Miss. 1986) (district court's opinion in the same case). The facts in Evans reveal that the victim was shot in the head as he knelt motionless behind a store owner during a robbery. Id. at 284; Evans v. State, 422 So.2d 737, 739

(Miss. 1982). The federal district court, using reasoning that was later adopted by the Fifth Circuit, 809 F.2d at 241, stated:

> In such circumstances, the mental anguish and psychological torture suffered by the victim prior to the infliction of the death-producing wound may be considered with respect to the "heinous, atrocious or cruel" factor and make its application constitutionally unobjectionable. Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984).

631 F. Supp. at 285.

Certainly the victim in the present case, Mr. Riddle, suffered the same mental anguish as did the victim in Thigpen when the Defendant Cartwright burst into Mr. Riddle's living room and murdered him with a shotgun after having shot Mr. Riddle's wife when she was in the hallway.

Furthermore, making physical suffering a constitutionally required element of "especially heinous, atrocious, or cruel" would mean that there has been a narrowing of the class of persons eligible for the death sentence strictly for its own sake. There is no reason to prohibit a state from imposing the death sentence upon a defendant who has killed in a manner that causes the victim to die immediately. The requirement that a victim suffer physical pain before this aggravating circumstance has been met would mean that in many cases if the killer is a poor marksman whose gunshot did not cause immediate death, he or she would be a candidate for the death sentence, while a good marksman would

escape the death sentence because his or her victim was killed immediately.

This distinction could also mean that someone who killed by stabbing with a knife, see, e.g., Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 474 U.S. 975 (1986); and Palmes v. Wainwright, 725 F.2d 1511, 1523-24 (11th Cir. 1984), cert. denied, 469 U.S. 873 (1984), would be a candidate for the death sentence, while those who used firearms would not. Those killers who use firearms should not receive the special protection this distinction would breed.[5]

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[5] All four Presidents of the United States who have been assassinated have died as a result of gunshot wounds (Lincoln, Garfield, McKinley, and Kennedy).

The definition "especially heinous, atrocious, or cruel" itself implies that the manner of killing and the attitude of the killer should be aspects of this aggravating circumstance.[6] Furthermore, in the present case the Oklahoma Court of Criminal Appeals engaged in a lengthy discussion of why this murder was "especially heinous, atrocious, or cruel." Cartwright v. State, 695 P.2d at 554. This is the process that other state appellate courts have used in

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[6] In his plurality opinion in Gregg v. Georiga, 428 U.S. 153, 185-86 (1976), Justice Stewart observed that the state of mind of the killer is a proper subject for capital punishment, noting that the deterrent aspect of the death sentence may be directed toward "carefully contemplated murders, . . . where the possible penalty of death may well enter into the cold calculus that precedes the decision to act [footnote omitted].

interpreting "especially heinous, atrocious, or cruel" or its equivalent. See Especially Heinous, 64 N.C.L. Rev. at 972-88. To require that "especially heinous, atrocious, or cruel" be limited only to those cases involving torture or physical abuse to the victim before death would be to restrict the types of crimes that qualify as such for no other reason than that this is a short and pithy definition of "especially heinous, atrocious, or cruel." However, if a state appellate court believes that longer and more detailed analysis of what acts constitute "especially heinous, atrocious, or cruel" or its equivalent is required, they should be granted that deference. It seems logical to consider the attitude of the

murderer and the manner of the killing in determining whether a particular murder is more heinous than others.

In the present case, the Oklahoma Court of Criminal Appeals gave a comprehensive explanation as to why it believed that the murder was "especially heinous, atrocious, or cruel," a task that necessarily involved review of the circumstances of the murder and the Defendant's motives, attitude, and efforts to conceal the crimes. Cf. Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982) (evidence was not sufficient to support the jury finding of "especially heinous, atrocious, or cruel" where prior to murder there had been an altercation in a bar between the defendant and the victim, and there was

no evidence of physical or mental suffering). In Godfrey this Court involved itself in a discussion of the mental state of the killer, the circumstances surrounding the crime, and the fact that he acknowledged responsibility for the crimes. 446 U.S. at 433.

Oklahoma contends that the standard of review regarding the sufficiency of evidence supporting aggravating circumstances should be the same as that involving federal review of the sufficiency of evidence in other state criminal cases. See Jackson v. Virginia, 443 U.S. 307 (1979). The standard should be whether any rational factfinder could have found the existence of the aggravating circumstance. See Godfrey v. Georgia,

446 U.S. at 451 (White, J., dissenting); and Jeffers v. Ricketts, 832 F.2d at 488 (1987) (dissenting opinion). The impossibility of requiring states to apply this aggravating circumstance in a principled way is demonstrated by the following statement by the majority opinion in Jeffers, 832 F.2d at 485, n. 8:

> We fail to see how this action of Jeffers [disposing of the body in a shallow grave three days after the murder] can be differentiated from placing a victim alive in a weighted sack and sinking the sack into a lake. . . ."

The requirement that the aggravating circumstance in question be limited by a definition restricting its use to those murders where the victim has suffered physical torture would result in an inappropriate intrusion

into substantive punishment imposed upon murderers by the states. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (the Court notes that it has generally "deferred to the State's choice of substantive factors relevant to penalty determination.").

B. THE REQUIREMENT THAT THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BE INTERPRETED IN A PRINCIPLED MANNER HAS NO PURPOSE SINCE THE COURT HAS APPROVED AN AGGRAVATING CIRCUMSTANCE THAT IS MORE VAGUE IN BAREFOOT V. ESTELLE, AND JUREK V. TEXAS, AND BECAUSE THE SENTENCER CAN CONSIDER NONSTATUTORY AGGRAVATING CIRCUMSTANCES, AND EVIDENCE OF ANY MITIGATING CIRCUMSTANCE.

While the Court in Godfrey v. Georgia, 446 U.S. 420 (1980), condemned the use of an open-ended aggravating circumstance (that the offense was outrageously or wantonly vile, horrible

or inhuman in that it involved torture, deprivation of mind, or an aggravated battery to the victim."), in Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983), the Court, citing California v. Ramos, 463 U.S. 992, 1005-06 (1983), and Jurek v. Texas, 428 U.S. 262, 274-76 (1976), held that the probability that the defendant would constitute a continuing threat to society," was a valid aggravating circumstance. In Barefoot, the Court made clear that "the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty . . . ." Id. at 896.

The State contends that this aggravating circumstance is more vague than the one at issue in the present

case, "especially heinous, atrocious, or cruel." If a jury could validly impose the death sentence upon a defendant based on an aggravating circumstance which required the jury to predict future conduct, as Barefoot and Jurek, say it may, then it makes little sense to hold that the aggravating circumstance "especially heinous, atrocious, or cruel" is overbroad if it involves a consideration of the attitude of the killer and the manner of killing. If anything, an aggravating circumstance that requires a jury to speculate as to whether a defendant is going to commit crimes in the future gives the jury more discretion than if it merely decides whether the crime was "especially heinous, atrocious, or

cruel." A decision that a crime is "especially heinous, atrocious, or cruel" involves an assessment of concrete, historical facts, while the prediction of future conduct is incapable of objective analysis.[7]

In California v. Ramos, 463 U.S. 992, 1001-06 (1983), the Court upheld the giving of an instruction that advised the capital jury that the governor was empowered to grant a reprieve, pardon, or commutation of a sentence. The Court held that "[t]he

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[7] In Ledewitz, The New Role of Statutory Aggravating Circumstances in American Death Penalty Law, 22 Duq. L. Rev. 317, 387-88 (1984), the author complains that, with reference to aggravating circumstances similar to the one in question in Barefoot, "[w]hatever the underlying merits of executing a defendant to prevent future harm, these circumstances are wildly overbroad and empirically inaccurate" [footnote omitted].

approval in Jurek of explicit consideration of the [the defendant's probable future dangerousness] defeats [Ramos'] contention that, because of the speculativeness involved, the State of California may not constitutionally permit consideration of commutation" [footnote omitted]. Id. at 1003.

This discussion is relevant to a consideration of the true function of a sentencer. The Court in Barefoot and Jurek noted that the task performed by a Texas jury in weighing the prospect that the defendant might commit crimes in the future "is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." Barefoot, 463 U.S. at 897, quoting Jurek, 428 U.S. at 274-76.

Oklahoma contends that the purpose of aggravating circumstances should be to give guidance to a sentencer when imposing the death sentence, see Poland v. Arizona, 476 U.S. 147, 156 (1986) ("[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."), and to genuinely narrow the class of persons eligible for the death sentence, Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988). They should not be a vehicle to give federal courts supervisory review over whether state courts are appropriately evaluating the death penalties imposed in their jurisdictions. Cf. Pulley v. Harris, 465 U.S. 37, 43-44 (1984)

(states are not required to conduct proportionality reviews of the death sentences imposed in their jurisdictions).

Furthermore, a state could adopt enough aggravating circumstances so that every murder scenario could be covered by one or more of them.[8] See, e.g., Utah Code Ann. 76-5-201 (Supp. 1987) (seventeen threshold offenses).[9]

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[8] In California v. Ramos, 463 U.S. 992, 999 (1983), the court noted that it has not undertaken "to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." Cf. Ledewitz, supra note 6, at 369-70.

[9] In Andrews v. Shulsen, 802 F.2d 1256, 1261-62 (10th Cir. 1986) the Tenth Circuit (construing the Utah statute which at that time contained eight threshold offenses) noted that under the Utah capital sentencing scheme, the jury would consider, in addition to those threshold offenses specifically listed, any other facts involving the defendant's character,

(continued...)

Some states have aggravating circumstances that relate to who the victim is. In Ledewitz, The New Role of Statutory Aggravating Circumstances in American Death Penalty Law, 22 Duq. L. Rev. 317, 377-81 (1984) [hereinafter The New Role] it is pointed out that state aggravating circumstances apply to all different types of victims, from news reporters to court officials.

Other aggravating circumstances relate to the treatment to which the victim was subjected. See The New Role, 22 Duq. L. Rev. at 390-94.

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[9](...continued)
background, history, and mental and physical condition. See also Barclay v. Florida, 463 U.S. 939 (1983); and Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) (it is constitutional for a sentencer to consider non-statutory aggravating circumstances).

Some states have as an element of the "especially heinous, atrocious, or cruel" aggravating circumstance that the victim suffered psychological torture, see Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984) (Florida), while another state's aggravating circumstance is if murder is committed "by lying in wait."[10] Fleemor v. State, 514 N.E.2d 80, 88 (Ind. 1987). In The New Role, 22 Duq. L. Rev. at 393, the author notes that Nevada "identifies random killing, without motive, as a statutory aggravating circumstance" [footnote omitted]. These different aggravating

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[10] In the present case, the Court of Criminal Appeals, in discussing why the murder was "especially heinous, atrocious, or cruel," noted that the Defendant "either lay in wait for him or returned under cover of darkness." 695 P.2d at 554.

circumstances apparently cover situations where the victim knows he or she is going to be killed and where he or she does not know it is going to happen.

Furthermore, Oklahoma contends that from the cases Proffitt v. Florida, 428 U.S. 242 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976), which held that a sentencer's discretion be guided, federal courts have moved to the holding by the Tenth Circuit in the present case, and by the Ninth Circuit in Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), that aggravating circumstances must be capable of objective analysis, which ultimately, means that the findings of such by state juries and appellate courts are subject to intensive review by the

federal judiciary. Cf. Godfrey v. Georgia, 446 U.S. 420, 450 (White, J., dissenting) ("our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of the facts that quite reasonably - perhaps even quite plainly - fit within the statutory language.").

In Jeffers v. Ricketts, 832 F.2d 476, the Ninth Circuit set aside the death sentence in a case involving the Arizona Supreme Court's interpretation of "especially heinous, atrocious, or cruel." The Ninth Circuit held that the Arizona Court's holding that "especially heinous, atrocious, or cruel" had several components, one of which was that the defendant relished the crime, made the application of

"especially heinous, atrocious, or cruel" invalid because "[o]f all of the components of heinousness and depravity set forth by the Arizona Supreme Court . . . none is more subjective than the relishing of the crime by the defendant." Id. at 484.

The Ninth Circuit in Jeffers also held that because of the definitions of "especially heinous, atrocious, or cruel" set forth by the Arizona Supreme Court, the Ninth Circuit was "unable to find a principled means of distinguishing the depravity of Jeffers' conduct from that in State v. Watson . . . ." Id. at 485.

Therefore, in addition to striking down state death sentences because they disagree with the way the state appellate courts are distinguishing

between different kinds of horrible murders, one panel of the Ninth Circuit,[11] and the Tenth Circuit now holds, in essence, that aggravating circumstances must not be "subjective" in nature. Apart from the unlikelihood of any entity being able to make principled comparisons of different murders and having to say that some are less heinous than others[12] (a weighing

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[11] As noted previously, another panel in the Ninth Circuit has upheld Arizona's application of the aggravating circumstance in question. Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987).

[12] In his dissent in Godfrey, Chief Justice Burger contended that the Court was now assuming "the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence." 442 U.S. at 443. It has been observed that Godfrey has been criticized by both sides in the capital punishment debate. See "Especially Heinous" 64 N.C.L. Rev. at 964, n. 129;

(continued...)

process that might not be appreciated by the victims in the cases found not to be quite as "heinous" as others), we now have an intrusion into state sentencing processes that seems inconsistent with principles of federalism. Cf. Pulley v. Harris, 465 U.S. 37 (1984).

The primary evils that existed in the imposition of the death sentence condemned by this Court in Furman v. Georgia, 408 U.S. 238 (1972) were: racism, id. at 250, n. 15 (Douglas, J., concurring); infrequency of imposition, id. at 313-14 (White, J., concurring); and the unpredictability of upon whom the death sentence is to be imposed,

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[12](...continued)
and Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1780 (1987).

id. at 309-10 (Stewart, J., concurring).

With regard to the first rationale behind Furman, the elimination of racism in the capital sentencing process, there is no showing that requiring a state appellate court to do the impossible, that is, to place a different value on different murders in different cases involving different defendants, has reduced the potential for racism being a factor in the imposition of the death sentence in this country. Cf. McCleskey v. Kemp, 107 S.Ct. 1756, 1781 (1987) (Brennan, J., dissenting). A better way of combating racism in the imposition of the death sentence would be through close scrutinizing of the jury selection, Batson v. Kentucky, 476

U.S. 79 (1986), Turner v. Murray, 476 U.S. 28 (1986), the prosecutor's closing arguments, Darden v. Wainwright, 106 S.Ct. 2464 (1986), and Caldwell v. Mississippi, 472 U.S. 320 (1985), and the effectiveness of trial counsel, Strickland v. Washington, 466 U.S. 668 (1984).

As for the infrequency of punishment argument, Oklahoma contends that the constant changing of the rules that govern the death sentence is why only ninety-four executions have occurred in this country since 1967.[13] See Coleman v. Balkcom, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from the denial of certiorari). Since there are nearly 2000 persons on death row in

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[13] Nat'l L. J., Feb. 15, 1988, at 31, col. 1.

this country,[14] and because no state legislature has repealed the death sentence since 1976, the failure to impose the death sentence is not due to reluctance on the part of the people or their elected representatives, and the states should not, therefore, be blamed for the lack of frequent executions in this country. See also Gregg v. Georgia, 428 U.S. at 182.

With regard to the unpredictability of who is to receive the death sentence, since under our system prosecutors have total discretion as to who is to receive the death penalty, see McClesky v. Kemp, 107 S.Ct. 1756 (1987), and Gregg v. Georgia, 428 U.S. at 199, it makes no sense to attempt to engraft some predictability in state

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[14] Id.

capitol sentencing schemes regarding upon whom juries will impose that sentence. Furthermore, juries inevitably will make different decisions in different cases. Also, because juries are considered to be buffers against governmental arbitrariness in our system, it is anomalous to give the government total discretion against whom it is going to seek the death penalty, yet minimize jury discretion in the matter.

Also, if in applying the "especially heinous, atrocious, or cruel" aggravating circumstance, state appellate courts must define such so that there can be a principled means of distinguishing between different types of cases, presumably they must apply the same principle to the aggravating

circumstance concerning predictions of future conduct, to insure that it is being applied in a logical manner. The impossibility of this task is evident, and would dispatch any court engaged in such an attempt down the same slippery slope that has been the problem since Godfrey.

Another reason why a rule requiring "objective" aggravating circumstances is unworkable is because this Court has previously held that a sentencer can rely on nonstatutory aggravating factors in imposing the death penalty. See Barclay v. Florida, 463 U.S. 939 (1983) (judge's consideration of the defendant's criminal record, which was not a statutory aggravating circumstance, did not invalidate death sentence), Zant v. Stephens, 462 U.S.

862 (1983), and The New Role, 22 Duq. L. Rev. at 319.

In Wainwright v. Goode, 464 U.S. 78 (1983), the Court upheld the death sentence in a case where the sentencing judge had relied on the nonstatutory aggravating circumstance of future dangerousness. There is no reason why statutory aggravating circumstances are to be held to a strict standard of objectivity if nonstatutory aggravating circumstances can be considered, particularly those involving a prediction of future dangerousness.

The third reason why it is futile to require states to interpret "especially heinous, atrocious, or cruel" in a way that eliminates all subjective aspects is that this Court has repeatedly held that a capital

sentencer must be permitted to consider any relevant mitigating evidence relating to a defendant's character or background. Skipper v. South Carolina, 476 U.S. 1 (1986). See also California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring) (jury instructions "must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character. . . ."). Since the jury has complete and unguided discretion, cf., Franklin v. Lynaugh, 823 F.2d 98, cert. granted, 108 S.Ct. 221 (1987), as to what it considers to be mitigating, and with regard to whether it outweighs the aggravating circumstances, the decision regarding mitigating evidence is completely

subjective.[15] Therefore, because subjective consideration of mitigating evidence has been injected into the capital sentencing formula, it is illogical to require the prosecution to rely only on objective aggravating circumstances.

Oklahoma urges the Court to accept its view that aggravating circumstances are guidelines for the sentencer's use, and a means to genuinely narrow the class of persons subject to the death penalty, and they should not be a device by which federal courts become intimately involved in the capital sentencing decision. Most

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[15] In The New Role, 22 Duq. L. Rev. at 350, n. 126, the author notes that in Gregg and Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court "approved unlimited discretion in the decision not to impose the death penalty." (Emphasis original.)

sentencing guidelines are vague to a certain extent, and to eliminate vagueness means to disregard the purpose of a sentencer - to exercise its discretion while being guided by certain criteria. "Any sentencing decision calls for the exercise of judgment." Barclay, 463 U.S. at 950.

PROPOSITION II.

THE FINDING BY THE JURY OF THE EXISTENCE OF A SECOND AGGRAVATING CIRCUMSTANCE, THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON, GENUINELY NARROWED THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE SO THAT THE IMPOSITION OF THE DEATH SENTENCE IN THE PRESENT CASE, WHICH WAS BASED ON THE JURY'S FINDING OF TWO AGGRAVATING CIRCUMSTANCES, WAS CONSTITUTIONAL.

In the present case, the jury found, in addition to the existence of the aggravating circumstance "especially heinous, atrocious, or

cruel," that the acts of the defendant "knowingly created a great risk of death to more than one person." Okla. Stat. tit. 21, § 701.12(2) (1981) (J.A. 18). There is no question that the facts of this case fully support this aggravating circumstance, and that the aggravating circumstance is sufficiently specific. The Tenth Circuit, however, held that since juries in Oklahoma weighed aggravating and mitigating circumstances, and the Oklahoma Court of Criminal Appeals did not reweigh such when it reviewed the Defendant's death sentence, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was applicable, and the death sentence was invalid.

In Lowenfield v. Phelps, 108 S.Ct. 546 (1988), the Court held that a

jury's finding in the second stage of the existence of only one aggravating circumstance, "knowingly creat[ing] a risk of death or great bodily harm to more than one person," was sufficient to support the death sentence even though it was merely a duplication of the underlying offense of the first degree murder for which the defendant was convicted in the guilt stage. The Court held that the finding by the jury sufficiently performed the narrowing function, and it was irrelevant whether this was done at the guilt or the sentencing phase of the trial. Id. at 554.

In the present case, the jury found the existence of essentially the same aggravating circumstance as did the jury in Lowenfield. The only difference

in the two cases is that in the present case the jury found the existence of a second aggravating circumstance, "especially heinous, atrocious, or cruel."

In Zant v. Stephens, 462 U.S. 862, 890 (1983) the Court stated:

> Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

In the present case the Tenth Circuit answered this question by holding that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be

vacated under the Eighth and Fourteenth Amendments." 822 F.2d at 1483. The Tenth Circuit held that the present case was different from Zant because Oklahoma's death penalty scheme requires the sentencer to "weigh" aggravating against mitigating circumstances, whereas under Georgia law, the state involved in the Zant decision, there is no requirement that aggravating circumstances be balanced against mitigating circumstances. Id. at 1479.

The distinction between those two types of sentencing processes was noted by this Court in Barclay v. Florida, 463 U.S. 939, 954 (1983). In Barclay, however, in his concurring opinion, Justice Stevens noted that "the Constitution does not prohibit

consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. at 967.

In the present case the evidence supporting the aggravating circumstance "especially heinous, atrocious, or cruel" was directly related to the character of the defendant and the circumstances of the crime. Furthermore, the instruction did not enumerate what the mitigating circumstances would be, merely stating that "[t]he determination of what are mitigating circumstances is for you as jurors to resolve under the facts and

circumstances of this case" (Instruction No. 17) (J.A. 12). See also Okla. Stat. tit. 21, § 701.10 (West 1983) (mitigating circumstances are not enumerated). Cf. Barclay v. Florida, 463 U.S. at 962-63 (Stevens, J., concurring) (aggravating circumstances are weighed against "statutorily enumerated mitigating circumstances").

Oklahoma contends that the finding of the aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person, in addition to the one involving the "especially heinous, atrocious, or cruel" standard, was a sufficient "individualized determination on the basis of the character of the individual and the circumstances of the crime. . . ." Zant, 462 U.S. at 879

(emphasis original). Also, these aggravating circumstances sufficiently narrowed the class of persons subject to the death sentence, Lowenfield v. Phelps, 108 S.Ct. at 554-55, and the imposition of the death sentence in the present case was, therefore, constitutional.

This is particularly true in view of the fact that the Oklahoma Court of Criminal Appeals conducted a proportionality review in the present case. Cartwright, 695 P.2d at 555, n. 7. Furthermore, the aggravating circumstance "especially heinous, atrocious, or cruel" was not found by the Oklahoma Court of Criminal Appeals to be invalid under state law. Since the Florida court's use of nonstatutory aggravating circumstances was held to

be a matter of state law in Barclay, the Oklahoma Court of Criminal Appeals' finding in the present case that the evidence supported the "especially heinous, atrocious, or cruel" aggravating circumstance should also be considered to be a matter of state law, and the Tenth Circuit's use of the state appellate court's construction of such to invalidate the death sentence where a second and concededly valid second aggravating circumstance was found seems inconsistent with Barclay.

Finally, in the present case, all of the evidence admitted to prove "especially heinous, atrocious, or cruel" would have been admissible to prove "great risk of death to more than one person." In Zant, 462 U.S. at 886, the Court noted that the evidence used

in support of the invalid aggravating circumstance was "fully admissible in the sentencing stage." The Court also stated:

> Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he had been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant.

462 U.S. at 887.

Because of the reasoning of the Tenth Circuit in this case, it is therefore presumably important whether the jury in Lowenfield, a Louisiana state case, also performed a weighing function with regard to aggravating and

mitigating circumstances. See Cartwright, 822 F.2d at 1481-83.[16]

Review of other Louisiana cases demonstrates that there is no difference between the function performed by juries in that state and juries in Oklahoma. In Welcome v. Blackburn, 793 F.2d 672, 677-79 (5th Cir. 1987), a Louisiana case, the prosecutor argued and presented evidence on only one aggravating circumstance (that the defendant "knowingly created and risk of death or great bodily harm to more than one person") and the trial judge read the entire list of aggravating and mitigating circumstances to the jury. The jury found the existence of the one

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[16] Obviously, Lowenfield was issued after the Tenth Circuit decided the present case.

argued by the prosecutor, and also found that the killing was "committed in an especially heinous, atrocious, or cruel manner." The Fifth Circuit held:

> Where the jury finds at least one aggravating circumstance that was valid and supported by the evidence, this Court has ruled that the refusal to review the validity of additional aggravating circumstances found by the jury is permissible as long as the jury's finding of arguable invalid aggravating circumstances "affected none of petitioner's substantial rights." Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982).

793 F.2d at 678.

The court also stated:

> Welcome asserts that the jury's unwillingness to impose the death penalty for the murder of Maturin demonstrates that they imposed the death penalty for his killing of Guillory based solely upon a finding of heinousness. Under State v. Culberth, 390 So.2d 847 (La. 1980), the aggravating circumstance of heinousness is satisfied only if the killing involves torture or

> the pitiless infliction of unnecessary pain on the victim. Welcome asserts that there was no proof that would satisfy this standard. Assuming this is so, we find that the clear proof of the first aggravating circumstance - the killing of two persons in a consecutive course of conduct - is sufficient to demonstrate that the jury finding of heinousness was harmless error.

793 F.2d at 678 (footnote omitted).

Oklahoma contends, therefore, that the factual and legal situations in the present case is identical to that in Welcome.

In Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 476 U.S. 1153 (1986), the court, in rejecting a defendant's contention that, since the Louisiana Supreme Court had previously held that one of the aggravating circumstances was unconstitutionally vague, the death

sentence in his case must also be invalidated, stated:

> David, however, is readily distinguishable from the instant case. In David, "a significant prior history of criminal activity" was the sole aggravating circumstance found by the jury. Here, the jury found two other aggravating circumstances supporting their recommendation of the death sentence. It is now settled law that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."

(Emphasis original.) See also Williams v. Maggio, 679 F.2d 381, 386-90 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (death sentence properly upheld where the Louisiana Supreme Court reviewed only one of the three aggravating circumstances found by the jury).

These cases are significant because under Louisiana's capital punishment scheme, which this Court dealt with in Lowenfield, the jury weighs the aggravating circumstances against mitigating circumstances when determining whether to impose the death sentence. See State v. Willie, 410 So.2d 1019, 1033 (La. 1982) appeal after remand, 436 So.2d 554 (1983) where the court stated:

> Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. State v. Sonnier, 402 So.2d 650, 657 (La. 1981).

See also State v. Knighton, 436 So.2d

1141, 1158 (La. 1983), cert. denied, 465 U.S. 1051 (1984).

These pronouncements might appear to be contradicted by those of the Fifth Circuit in Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987), which stated that Louisiana law does not require weighing of aggravating against mitigating circumstances. This statement was supposedly based on review of the Louisiana sentencing statute, La. Code Crim. Pro. Ann. 905.3 (West 1986), and the court's reading of several Louisiana cases.

The above-mentioned sentencing statute states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

(Emphasis added.)

Obviously, the jury is engaged in a weighing process if it considers both the aggravating circumstance it has found and then imposes sentence, and the question of whether the jury either "weighed" or "considered" each is basically a matter of semantics. See also Gray v. Lucas, 677 F.2d 1086, 1106 (5th Cir. 1982), on rehearing, 685 F.2d 139 (5th Cir. 1982), cert. denied, 463 U.S. 1237 (1983) (under Mississippi law the jury weighs aggravating against mitigating but may still sentence the defendant to life even if aggravating circumstances outweigh mitigating circumstances).

The second basis for the court's belief in Wilson v. Butler, 813 F.2d at 674, that juries in Louisiana do not

weigh aggravating circumstances and mitigating circumstances is three Louisiana cases. 813 F.2d at 674, n. 36. Perusal of two of the cases, however, reveal that they hold only that a defendant is not entitled to an instruction that the jury should recommend the death sentence only if the aggravating factors outweigh the mitigating factors. See State v. Jones, 474 So.2d 919, 932 (La. 1985); and State v. Welcome, 458 So.2d 1235, 1246-47 (La. 1983). The third case, Sawyer v. State, 442 So.2d 1136, 1137-39 (La. 1983) merely states that nothing in Louisiana's statutory scheme requires that the jury must find the existence of at least one statutorily aggravating circumstance before the defendant can be sentenced to death.

Significantly, the court noted that "the finding of statutory aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." (Emphasis original) (footnote omitted). Id. at 1139. Cf. State v. Flowers, 441 So.2d 707, 716-17 (La. 1983) ("[h]aving found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance so found, before recommending that the sentence of death can be imposed.") (emphasis added).

Therefore, contrary to the Fifth Circuit's statement in Wilson v. Butler, under Louisiana law the jury does weigh the aggravating against the mitigating circumstances in capital

cases. See Williams v. Maggio, 679 F.2d 381, 389 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (en banc opinion involving Louisiana capital case where Fifth Circuit noted that "[w]hen one or more of the statutory aggravating circumstances is found, the jury must balance this against the mitigating circumstances offered by defendant").

In Zant v. Stephens, 462 U.S. 862, 880 (1983), the Court held that the Constitution does not require states to adopt specific standards regarding the weighing of aggravating circumstances. In Barclay, the Court stated that the Constitution does not require "that the sentencing process be transferred into a rigid and mechanical parsing of

statutory aggravating factor." 463 U.S. at 950.

In Barclay, Justice Stevens in his concurring opinion noted that in Florida and Georgia, "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." 463 U.S. at 963. Certainly, in the present case, under Oklahoma's capital sentencing scheme, the jury was free to find mitigating circumstances outweighing any number of aggravating circumstances and impose a life sentence upon the Defendant.

In Oklahoma, the jury also is not required to impose a death sentence if the aggravating circumstances outweigh

the mitigating circumstances. In the present case the jury was instructed as follows (Instruction No. 15):

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In the event, the sentence must be imprisonment for life.

(J.A. 11) (emphasis added).

This is consistent with Oklahoma law. In Parks v. State, 651 P.2d 686, 693 (Okla. Crim. App. 1982) it was stated:

> As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life.

See also Oklahoma Uniform Jury Instructions (Criminal) 437. Furthermore, as noted previously, under Oklahoma law in effect at that time, the Oklahoma Court of Criminal Appeals conducted a statutorily required proportionality review, which was considered to be important in a Fifth Circuit case involving Louisiana's capital punishment scheme. Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984).

The interchangeability of the words "consider" and "weigh" with regard to a jury's measuring one against the other in deciding whether to impose the

death sentence demonstrates that the alleged difference between the Georgia, Louisiana, and Oklahoma death penalty schemes are really distinctions without a difference. Under Georgia law the jury is required to consider "any mitigating circumstances." Ga. Code Ann. § 17-10-30 (1982). Since "[t]he sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances. . . ." Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), supplemented, 722 F.2d 629 (11th Cir. 1984), cert. denied, 465 U.S. 1084 (1984), Georgia juries obviously perform a weighing process. Furthermore, the Constitution would be violated if the sentencer were precluded from considering mitigating

circumstances. Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). Therefore, these juries obviously weigh mitigating circumstances against the aggravating circumstance[s] they have found.

As noted previously, under Oklahoma law the jury in the present case was neither limited by enumerated mitigating circumstances, nor was it required to impose the death sentence upon the finding of one or more aggravating circumstance. Furthermore, the finding of the "especially heinous, atrocious, or cruel" aggravating circumstance should not affect the death sentence since another one was found by the jury. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (only one overbroad aggravating circumstance

was found by the jury). Also, this is not a case where the State is relying solely on a nonstatutory aggravating circumstance. Cf. Zant v. Stephens, 462 U.S. at 876, and Barclay v. Florida, 463 U.S. at 966-67 (Stevens, J., concurring) ("a death sentence may not rest solely on a nonstatutory aggravating circumstance.") (emphasis original).

Since the jury found the existence of the aggravating circumstance, that the defendant "knowingly created a risk of death or great bodily harm to more than one person" (the identical aggravating circumstance to the sole one found by the Louisiana jury in Lowenfield), the class of persons subject to the death sentence has been genuinely and sufficiently narrowed.

That the Louisiana jury in Lowenfield found, as an element of the crime of capital murder in the guilt stage, that the Defendant intended to kill or inflict great bodily harm on more than one person, is irrelevant because in the present case the Defendant was found guilty of killing the victim Hugh Riddle "with malice aforethought," and was convicted of Shooting With Intent to Kill with regard to Charma Riddle. Therefore, Lowenfield and the present case are factually and legally the same with regard to the narrowing function performed by the jury.

CONCLUSION

For the reasons stated, respectfully requests that the judgment of the

United States Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

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APPENDIX "A"

"HEINOUS, CRUEL" STATES

Alabama - Ala. Code § 13A-5-49(8) (1981)
The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Arizona - Ariz. Rev. Stat. Ann. § 13-703F(6) (Supp. 1985)

The defendant committed the offense in an especially heinous, cruel or depraved manner.

Arkansas - Ark. Stat. Ann. § 5-4-604(5) (1987)

The capital murder was committed in an especially heinous, atrocious or cruel manner.

California - Cal. Penal Code § 190.2 (a)(19) (West Supp. 1978)

The murder was especially heinous,

atrocious or cruel manifesting exceptional depravity. As utilized in this section the phrase "especially heinous, atrocious or cruel manifesting exceptional depravity" means a consciousless or pitiless crime which is unnecessarily torturous to the victim.

Colorado - Colo. Rev. Stat. § 16-11-103(1)(6)(6xj) (1986)

The defendant committed the offense in an especially heinous, cruel or depraved manner.

Connecticut - Conn. Gen. Stat. § 53a-46a(h)(1) (1985)

The defendant committed the offense in an especially heinous, cruel or depraved manner.

Delaware - Del. Code Ann. tit., § 4209(e)(1) (1987)

The murder was outrageously or wantonly vile, horrible

or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering time.

Florida - Fla. Stat. § 921.141(5)(h) (1984)

The capital felony was especially heinous, atrocious or cruel.

Georgia - Ga. Code. Ann. § 17-10-30(b)(7) (1981)

The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim.

Idaho - Idaho Code § 18-4505(6)(d) (1987)

The kidnapping was especially heinous, atrocious or cruel manifesting exceptional depravity.

Idaho Code § 19-2515(g)(5) (1987)

The murder was especially heinous, atrocious or cruel manifesting exceptional depravity.

Illinois - Ill. Rev. Stat. ch. 38, § 9-1(b)(7) (Supp. 1987)

The murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

Louisiana - La. Code Crim. Proc. Ann. art. 905.4(a)(7) (West Supp. 1987)

The offense was committed in an especially heinous, atrocious or cruel manner.

Mississippi - Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1983)

The capital offense was

especially heinous, atrocious or cruel.

Missouri - Mo. Rev. Stat. § 565.032(2)(7) (Supp. 1984)

The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.

Nebraska - Neb. Rev. Stat. § 29-2523(1)(d) (1985)

The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence.

Nevada - Nev. Rev. Stat. § 200.033(8)

The murder involved torture, depravity of mind or the mutilation of the victim.

New Hampshire - N.H. Rev. State. Ann. § 630:5(II)(a)(7) (1986)

The murder was exceptionally heinous, atrocious or cruel.

New Jersey - N.J. Rev. Stat. § 2C:11-3(c)(4)(c) (Supp. 1986)

The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated assault to the victim.

North Carolina - N.C. Gen. Stat. § 15A-2000e(9) (1981)

The capital felony was especially heinous, atrocious or cruel.

Oklahoma - Okla. Stat. tit. 21, § 701.12(4) (1981)

The murder was especially heinous, atrocious or cruel.

South Dakota - S.D. Codified Laws Ann. § 23A-27A-1(6) (Supp. 1981)

The offense was outrageously or wan-

tonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

Tennessee - Tenn. Code Ann. § 39-2-203(i)(5) (1981)

The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

Utah - Utah Code Ann. § 76-5-202(1)(q) (Supp. 1985)

The homicide was committed in an especially heinous, atrocious, cruel or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse or serious bodily injury of the victim before death.

Wyoming - Wyo. Stat. § 6-2-102(h)(vii) (Supp. 1983)

The murder was espe-

cially heinous, atrocious or cruel.